

**IN THE
MISSOURI SUPREME COURT**

STEVE BURGESS, et al.,

Respondent,

vs.

LYNNE GREENE-BELDNER, et al.

Appellant.

No: 84501

On Appeal from the St. Louis County Circuit Court
The Honorable Bernhardt C. Drumm, Jr., Judge
Case No: 02CC-000920

BRIEF OF AMICUS CURIAE

CURTIS, OETTING, HEINZ,
GARRETT & O'KEEFE, P.C.
Kevin M. O'Keefe, #23381
Paul E. Martin, #34428
130 South Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 Fax

Attorneys for Amicus Curiae Board of
Election Commissioners of St. Louis
County, Missouri

TABLE OF CONTENTS

TABLE OF CONTENTS:	1
TABLE OF AUTHORITIES.....	2
POINTS RELIED ON.....	3
ARGUMENT	5
CONCLUSION.....	11
CERTIFICATE OF COMPLIANCE	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

CASES:

<i>Missouri Bluffs Golf Joint Venture v. St. Charles County Board of Equalization</i> , 943 S.W.2d 752 (Mo. App. 1997).....	3, 4
<i>State ex rel. Referendum Petitioners Committee Regarding Ordinance #4639 v. Lasky</i> , 932 S.W.2d 392 (Mo. banc 1996).....	3, 4, 5, 6, 11
<i>Young v. Godfrey</i> , 966 S.W.2d 331 (Mo. App. 1998).....	3, 6, 11

STATUTES

Chapter 115 RSMo.....	3, 9, 11
Section 115.125 RSMo.....	5, 6, 8, 11
Section 115.125.1 RSMo.....	4, 5, 8
Section 115.125.2 RSMo.....	4, 5, 6
Section 115.127.2 RSMo.....	7
Section 115.127.6 RSMo.....	10
Section 115.233 RSMo.....	7
Section 115.359.2 RSMo.....	10
Section 115.363.3 RSMo.....	10
Section 115.373.1 RSMo.....	10
Section 115.379 RSMo.....	10
Section 115.419 RSMo. 2000	7

POINT RELIED ON

THE TRIAL COURT ERRED IN ORDERING THE ST. LOUIS COUNTY BOARD OF ELECTION COMMISSIONERS TO INCLUDE RESPONDENT BURGESS ON THE MUNICIPAL ELECTION BALLOT FOR THE CITY OF WILDWOOD BECAUSE THE COURT LACKED AUTHORITY TO DO SO IN THAT MISSOURI LAW ESTABLISHES A MANDATORY DEADLINE FOR SUCH ACTION AND THAT DEADLINE HAD PASSED AT THE TIME THE COURT ISSUED ITS ORDER, THUS DEPRIVING THE COURT OF SUBJECT MATTER JURISDICTION.

Missouri Bluffs Golf Joint Venture v. St. Charles County Board of Equalization, 943 S.W.2d 752 (Mo. App. 1997)

State ex rel. Referendum Petitioners Committee Regarding Ordinance #4639 v. Lasky, 932 S.W.2d 392 (Mo. banc 1996)

Young v. Godfrey, 966 S.W.2d 331 (Mo. App. 1998)

Chapter 115 RSMo.

Introduction

The St. Louis County Board of Election Commissioners (the "Board") raises this issue on behalf of itself and all election authorities throughout the State of Missouri. Conducting timely and accurate elections is the primary reason for the existence of such authorities, and this service will be substantially compromised if statutory ballot deadlines are illusory. The Board accordingly urges this Court to reach the jurisdictional issue presented by this case and reaffirm *State ex rel. Referendum Petitioners Committee Regarding Ordinance #*

4639 v. Lasky,, 932 S.W.2d 392 (Mo. banc 1996). If the Court determines that the Lasky decision is not apposite, the Board requests guidance as to when trial courts may order ballot additions after the statutory deadline has passed.

Standard of Review

A reviewing court reviews the grant of a writ of mandamus under an abuse of discretion standard. A writ of mandamus will not be reversed where it appears to have been lawfully exercised and no abuse is shown. Missouri Bluffs Golf Joint Venture v. St. Charles County Board. of Equalization, 943 S.W.2d 752, 754-755 (Mo. App. 1997).

Dispositive Facts

On March 8, 2002, respondent Burgess filed a mandamus proceeding in the St. Louis County Circuit Court seeking to be placed on the ballot for the Wildwood City Council. On March 19, 2002, the circuit court ordered the Board to place Burgess on the ballot for the election, to be held two weeks later on April 2, 2002.

Section 115.125.1, RSMo., requires certification to the election authority of the issues and candidates for a political subdivision's election not later than ten (10) weeks prior to the scheduled election. Section 115.125.2 permits a political subdivision, under certain conditions and upon court order, to make late certification to the election authority, but in no case later than 5:00 p.m. on the sixth Tuesday before the election in question.

The ten (10) week certification deadline for the April 2, 2002, Wildwood municipal election was January 22, 2002. *Section 115.125.1, RSMo.* The deadline for court ordered late certifications was February 19, 2002. *Section 115.125.2, RSMo.* The trial court issued its writ on March 19, 2002, approximately four weeks after the statutory deadline. The issue presented is whether the trial court exceeded its lawful authority by issuing its writ after the deadline has passed.

Argument

The Board submits that the circuit court lacked authority to order the late certification of respondent Burgess as a candidate and the subsequent inclusion of Burgess on the ballot. Both the law and the practicalities of conducting an election enforce the determination that the statutory certification deadlines of Section 115.125, RSMo., are mandatory. Since those deadlines were exceeded in this case, the St. Louis County Circuit Court lacked any jurisdiction to issue its writ of mandamus.

In *State ex rel. Referendum Petitioners Committee Regarding Ordinance # 4639 v. Lasky*, 932 S.W.2d 392 (Mo. banc 1996), the trial court ordered the St. Louis County Board of Election Commissioners to include a proposition on a ballot after the late certification deadline established by Section 115.125.¹ Relators

¹ Section 115.125 at that time had only the ten week deadline now included in Section 115.125.1. The permissive six week late certification deadline found in Section 115.125.2 was enacted after the *Lasky* decision.

applied to the Missouri Supreme Court for a writ prohibiting the enforcement of the order. This Court held that "[t]he provisions of section 115.125 are mandatory, not directory. . . . The Respondent was without authority to order the measure added to the ballot." Lasky, 932 S.W.2d at 392 (*citation omitted*).

The only substantive difference between Lasky and the instant case is that the circuit court ordered respondent Burgess, rather than a proposition, to be added on the ballot after passage of the statutory deadline. But Section 115.125 does not recognize any distinction between a proposition and a candidate. Indeed, in Young v. Godfrey, 966 S.W.2d 331 (Mo. App. 1998), the Eastern District was confronted with facts almost identical to the Burgess case. In Young the trial court issued its writ of mandamus ordering the Board to include a recall election on the April 7, 1998 ballot, but the writ did not issue until March 2, 1998. Relying on Lasky, the Eastern District issued its writ of prohibition because the trial court's order issued after the statutory deadline. Young, 966 S.W.2d at 332.

The statutory deadlines found in Section 115.125 are critical to conducting efficient and accurate elections. To conduct an election the Board must accomplish, at minimum, the following:

- a. print ballots bearing the proper array of candidate names and propositions;
- b. prepare, test and verify computer instructions identifying the valid array of positions where votes can be recognized for tabulation;

- c. prepare voting equipment (“vote recorders”) so as to enable voters to make punches in ballot cards in valid positions for the lawful array of candidates and issues presented to them;
- d. prepare and distribute voting equipment, including ballots, vote recorders, ballot transfer cases and ballot boxes to the required polling locations;
- e. order, inspect, test and verify computer cards which instruct the tabulating equipment where valid votes (punch positions on the ballot cards) can be cast for each polling location so all valid votes will be tabulated and errant punches ignored;
- f. twice publish public notice of the election, including the correct array of candidates and propositions, with the first publication being “in the second week prior to the election” and the second publication being “within one week prior to the election” (Sec. 115.127.2, RSMo.);
- g. print and distribute sample ballots to the polling places showing the correct array of candidates and issues for consideration by voters at each polling location in conformity with the official ballot (Sec. 115.419, RSMo. 2000); and
- h. conduct a public test of the electronic tabulating equipment, programmed and configured as for election day, within five (5) days prior to the election and after giving at least forty-eight (48) hours public notice of such test (Sec. 115.233, RSMo.) and to not alter or modify that program or equipment after testing.

Even when conducting an election for only one political subdivision, these tasks are time consuming and labor intensive. With concurrent elections, especially in overlapping jurisdictions, the tasks become unwieldy, if not Herculean. For county-wide elections the Board is called upon to serve over six hundred thousand (600,000) registered voters at over four hundred (400) separate polling places in St. Louis County. The April general elections each year involve approximately one hundred and forty (140) separate political subdivisions submitting hundreds of different candidates and issues for voter decision. If the deadlines of Section 115.125 can be ignored by the St. Louis County Circuit Court, the election process can be disrupted, and this can lead to voting inequities, inadequate notice to voters, errors in tabulations and subsequent election challenges.

In respondent Burgess' case the Board relied on the unchallenged certification from Wildwood to carry out its statutory duties to conduct the election. It had printed and distributed absentee ballots, and such balloting had been ongoing for seventeen days prior to the filing of Burgess' mandamus petition. The Board had also prepared appropriate ballot pages, related public notices, sample ballots, vote recorders and tabulation software. In doing so the Board organized the election for Wildwood, and for all overlapping school districts, special districts and governmental entities, in such a way that sufficient space and ballot positions were made available to accommodate the number and array of candidates and issues properly certified for the April 2 election. Rearranging the

ballot to accommodate respondent Burgess on two weeks notice was no small feat, and it is a credit to the Board's staff that they were able to accomplish the task at all.

That success, however, does not diminish the risk of error, or the possible inability to conduct an election on a timely basis, when a court decides to add issues or candidates to a ballot at the eleventh hour. And last minute changes can only lead to charges of voting irregularities, tabulation errors and even election fraud.

The Board has attempted to identify some of the myriad complexities associated with conducting elections as challenging those that take place every April in St. Louis County. Though the Board makes every effort to accommodate changes and revisions that occur due to candidate disqualification, death, special vacancy elections, ballot wording revisions and timely court approved delayed certifications and withdrawals, there is a practical limit to an election authority's ability to "turn on a dime." There comes a point when the election authority – and the voters – simply must be able to rely on the fact that the ballot to be used for a given election is final.

Chapter 115 RSMo. provides a detailed and comprehensive scheme for modification of the ballot after it has been certified to the election authority. This statutory framework balances procedures for virtually every circumstance that might arise with the need for integrity of the election process and the voters' right to rely on the finality of the ballot. Not one of these statutory deadlines is as short

as the one imposed on the board in the Burgess case.

For example, Section 115.125.1 deals with late certification of candidates in the case of a special election to fill a vacancy. In such exigent circumstances the time frame to conduct the election is shortened and requires that notice of the election to the election authority be made before the names of the candidates may be known. Under those special circumstances the names of the candidates must be certified to the election authority not later than four weeks before the election. But at least the need to accommodate that election is known in time to arrange matters so that late completion of election materials can be accomplished.

Sections 115.127.6 and 115.359.2 provide that a candidate's name may be removed from the ballot pursuant to court order at the candidate's request not later than six weeks before the election.

Section 115.363.3 provides the deadlines for modification of a general election ballot under certain circumstances. If a candidate is disqualified not less than six weeks before the election, the candidate may be replaced on the ballot. If a candidate dies not less than four weeks before the election, the candidate may be replaced on the ballot. But in neither event may a substitute candidate be certified later than twenty-eight (28) days before the election or the fourth Friday before the election, whichever occurs sooner. *Section 115.373.1, RSMo.*

After these statutory deadlines have passed the ballot may not be modified, even in the extreme case where a candidate has died. Section 115.379 provides explicitly that if a candidate dies less than four (4) weeks before an election or is

disqualified less than six (6) weeks before an election, the election is to be held without modifying the ballot.

In this case, respondent Burgess did not even file his petition for relief until 3 weeks before the election, and the St. Louis County Circuit Court did not order Burgess' inclusion on the Wildwood ballot until just two weeks before the election. Under any circumstance contemplated by the legislature, and under any time frame provided by Chapter 115, the time to modify the ballot for this election had expired. The trial court accordingly acted outside of his authority. *State ex rel. Referendum Petitioners Committee Regarding Ordinance # 4639 v. Lasky*, 932 S.W.2d 392 (Mo. banc 1996); *Young v. Godfrey*, 966 S.W.2d 331 (Mo. App. 1998).

Conclusion

Statutory deadlines are critical to the efficient and fair administration of elections. By ignoring those deadlines a trial court needlessly burdens the election authority and the public, and places at risk the integrity of the election and the credibility of the authority. Tardy court-ordered ballot modifications can also affect the outcome of an election, through absentee voting or through human or mechanical error.

For all of these reasons the Board urges the Court to reaffirm its decision in *State ex rel. Referendum Petitioners Committee Regarding Ordinance # 4639 v. Lasky*, 932 S.W.2d 392 (Mo. banc 1996), by finding that the Section 115.125's six week certification deadline is mandatory. In the alternative, the Board requests guidance as to when circuit court's may be allowed to order post-deadline ballot

modifications.

Respectfully Submitted,

CURTIS, OETTING, HEINZ,
GARRETT & O'KEEFE, P.C.

Kevin M. O'Keefe, MBE#23381
Paul E. Martin, MBE#34428
130 South Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 Fax

Attorneys for the Board of Election
Commissioners of St. Louis County,
Missouri

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies as counsel of record for respondents that:
(1) that this brief includes the information required by Rule 55.03, (2) the brief complies with the limitations contained in Rule 84.06(b), (3) the word count for this brief is 2,520 per Microsoft Word 97 and (4) the diskette provided to the court and to the appellants has been scanned for viruses and is free of same.

CURTIS, OETTING, HEINZ,
GARRETT & O'KEEFE, P.C.

Kevin M. O'Keefe, MBE#23381
Paul E. Martin, MBE#34428
130 South Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 Fax

Attorneys for the Board of Election
Commissioners of St. Louis County,
Missouri

CERTIFICATE OF SERVICE

Two true and correct copies of the foregoing were delivered through First Class U.S. Mail this 13th day of August, 2002, to:

Timothy J. Gallagher
Fox, Gallagher & Finley, L.L.P.
FAX No. 314-725-0101
University Club Tower, Suite 1555
1034 S. Brentwood Boulevard
St. Louis, Missouri 63117
Attorney for Respondent Burgess

Daniel G. Vogel and Leslye M. Winslow
Cunningham, Vogel & Rost, P.C.
75 W. Lockwood, Suite One
St. Louis, Missouri 63119
Attorney for the City of Wildwood

Jeremiah W. Nixon and Karen P. Hess
Office of the Missouri Attorney General
221 W. High Street
P. O. Box 899
Jefferson City, Missouri 65102
Attorneys for Appellant Attorney General
